Supreme Court, U. S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1055 and 73-1069-73-1072

In the Supreme Court of the United States

OCTOBER TERM, 1973

BOWMAN TRANSPORTATION, INC., APPELLANT
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

JOHNSON MOTOR LINES, INC., APPELLANT
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

RED BALL MOTOR FREIGHT, INC., APPELLANT
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

LORCH-WESTWAY CORP., ET AL., APPELLANTS
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS
v.
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

WILLIAM L. PATTON,
Assistant to the Solicitor General,

CARL D. LAWSON,
ROGER B. ANDEWELT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,

BETTY JO CHRISTIAN,
Associate General Counsel,

RICHARD H. STREETER,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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OPINIONS BELOW

The opinions of the district court (App., vol. II, 1275, and vol. I, 807) are reported at 364 F. Supp. 1239. The report of the Interstate Commerce Commission (App., vol. I, 101) is published at 114 M.C.C. 571. The final order of the Commission (App., vol. I, 363) is not reported.

JURISDICTION

The judgment of the district court was entered on September 11, 1973 (App., vol. I, 739). Appellants, United States and Interstate Commerce Commission, filed a motion for amendment of judgment on September 17, 1973 (App., vol. I, 795). On October 4, 1973, the district court denied the motion (App., vol. I, 807). Five separate notices of appeal were timely filed (App., vol. I, 801-802, 803-806, 825-826, 827-830, 831-834). On November 13, 1973, Mr. Justice Blackmun extended the time for docketing the appeals to January 8, 1974 (App., vol. I, 845), and they were docketed on January 5 and January 8. On April 29, 1974, this Court noted probable jurisdiction and consolidated the five appeals. The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the district court's reversal of the Interstate Commerce Commission's decision finding that certain additional motor carrier service is required by the public convenience and necessity was based upon improper standards of judicial review.
2. Whether the district court's refusal to remand the case to the Commission improperly precluded the Commission from further consideration of the substantive merits of the issues of public convenience and necessity.

STATUTES INVOLVED

The pertinent statutory provisions, the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding 1, Section 207 of the Interstate Commerce Act, 49 Stat. 551, as amended, 49 U.S.C. 307, and Section 706 of the Administrative Procedure Act, 80 Stat. 393, 5 U.S.C. 706, are set forth in the Joint Appendix at vol. I, pp. 93-100.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court invalidating an order of the Interstate Commerce Commission. The order in question authorized issuance of certificates of public convenience and necessity to three applicants conferring authority to transport general commodities by motor vehicle over regular routes between specified points in the southeastern and southwestern United States. The Commission found that existing

service between the points involved was not reasonably adequate to meet the demonstrated needs of the shipping and receiving public, and that the public convenience and necessity required the grant of these certificates. The district court, although finding the Commission's decision to be supported by portions of the record, concluded that the Commission's findings and conclusions were arbitrary, capricious and without a rational basis. The court further found that the record was too stale to permit a determination of the issues, and refused to remand the case to the Commission for further proceedings.

PROCEEDINGS BEFORE THE COMMISSION

Between December 1964 and July 1965, the Commission received twenty applications from motor common carriers seeking authority to conduct general commodity operations between points in the southwest and southeast. After a prehearing conference in 1966, the Commission ordered that ten of the applications be heard on a consolidated record.

During the one hundred and forty-nine days of hearings [1] more than nine hundred shippers and receivers of freight testified on behalf of the applicants (App., vol. II, 867). Sixty-six competing rail and motor carriers opposed these applications.[2] These protestants were supported by 62 witnesses (*id.* at 868).

[1] The hearings, which were scheduled at intermittent intervals, extended from March 1966 to August 1967.

[2] Each of the applicants was also a protestant to the other applications.

The two examiners who heard the evidence recommended that all ten applications be denied. In arriving at this recommendation the examiners established some forty-five separate categories of commodities and examined the evidence with respect to each commodity category. The recommendation was also based on the assumption that granting all ten applications would adversely affect existing carrier service. The examiners acknowledged that many complaints had been voiced by shippers concerning inconsistent and lengthy transit times, inadequate pick-up service, difficulties in tracing, and loss and damage claims (App., vol. II, 873), but found that the proposed services would not be "sufficiently superior to that of the existing carrier services to support a conclusion that the public convenience and necessity require the operation proposed" (*id.* at 874).

Upon the filing of exceptions to the examiners' report and responses, the matter was considered by the Commission, Division 1 (App., vol. I, 101-361). The Commission performed a thorough re-evaluation of the evidence, the recommendations of the hearing examiners, and the pleadings. It adopted the examiners' "summary of the evidence presented by the protestants as to their authorities, equipment, and operations" (*id.* at 105). It did not, however, adopt the examiners' grouping of the evidence on a commodity by commodity basis. The Commission determined that the evidence should be analyzed on a geographic basis in order to obtain "a clearer picture of the supporting witnesses' needs" (*id.* at 121). It

found that "[t]he evidence considered in its entirety is convincing that the additional services * * * will serve a useful public purpose, responsive to a public demand and need, and that available transportation services between the points and to the extent authority is granted herein are not reasonably adequate to meet the demonstrated needs of the shipping and receiving public" (*id.* at 129).

In reaching this conclusion, the Commission recognized that the traffic studies presented by the supporting shippers were subject to certain infirmities and that "some of the witnesses either have not tried all of the available motor carrier service or did not route their relevant traffic" (*id.* at 130). However, because of the collective weight of the documentary evidence, and particularly the evidence relating to problems with excessive and inconsistent transit times (*id.* at 129-130), "restrictions or embargoes which limit the service available * * *; outright refusals by existing carriers to handle their traffic; pickup and delivery problems; interline difficulties relating to loss, damage, tracing, shortages, and misrouting; lost business and accounts; and customer complaints" (*id.* at 130), it was concluded that "[c]onsidered as a whole, the record demonstrates that many of the supporting witnesses are not receiving reasonably adequate service" and that they "have shown a valid public need for additional motor carrier service" (*ibid.*).

The Commission also considered the transit time studies submitted by fourteen of the protesting carriers, and stated that those studies demonstrated "that in certain instances during the study periods expeditious service was rendered by certain of the protestants" (*id.* at 145). However, the Commission concluded that the protestants' studies were entitled to less weight than the supporting shippers' studies because they failed to reflect a truly representative picture of existing conditions in the area prior "to the notice of the commencement of the hearings in these proceedings" (*ibid.*).[3]

But the Commission also determined that, even though additional service was needed, a grant of all ten applications "could lead to unhealthy, if not cutthroat, competition inimical to the public interest" (*id.* at 147). Evaluating the quantum of existing service available, the "substantial evidence of widespread public dissatisfaction with available transportation services" (*ibid.*) and the indication of a rapidly increasing demand in this area for "added motor carrier service of a direct, single-line nature" (*id.* at 148), the Commission concluded that the authorization of three new, and somewhat competitive and overlapping services, was warranted. It selected Red Ball, Bowman and Johnson as best suited to meet the demonstrated needs of the public (*ibid.*).

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[3] In reaching this conclusion, the Commission noted two deficiencies in the protestants' traffic studies: "(1) that most either relate to short periods of time or cover traffic handled for specified shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers" (*Ibid.*).

Petitions seeking reconsideration and reopening were denied by the Commission, Division 1, Acting as an Appellate Division, on September 1, 1972 (App., vol. I, 363-369). Petitions seeking a declaration by the Commission that the proceeding involved an issue of general transportation importance were denied by order of the entire Commission dated October 6, 1972 (App., vol. II, 1271).

THE DECISIONS OF THE DISTRICT COURT

On October 4, 1972, the appellees instituted an action in the district court to set aside and enjoin the report and order of the Commission. On September 11, 1973, the three-judge court issued an opinion and judgment (App., vol. II, 1275-1325) setting aside the Commission's order and permanently enjoining the Commission from issuing the certificates (*id.* at 1320).

The district court noted that an order of the Commission will ordinarily be sustained if it "is based on appropriate findings which in turn are supported by substantial evidence" (*id.* at 1304). However, it declared that Section 706(2)(A) of the Administrative Procedure Act sets forth requirements "in addition to" the requirement that certain agency actions be supported by substantial evidence and accordingly "a mere review of the sufficiency of the evidence will not suffice in a proceeding, such as the one now before the court, where the agency action is alleged to be arbitrary and capricious and resulting from an abuse of discretion" (*id.* at 1307). The

court purported to base its conclusion that an agency decision which is supported by substantial evidence may nonetheless be set aside as "arbitrary and capricious" on this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

The district court then declared that the Commission had acted in an "arbitrary and capricious" manner in evaluating the evidence. This conclusion was based primarily upon the Commission's statements with respect to the probative value of certain transit time studies which the protestants had introduced to demonstrate the adequacy of existing service. (See Conclusions 12-15, App., vol. II, 1310-1312.) The court declared that there is "no rational basis" for the Commission's refusal to give greater weight to those studies and that the Commission had acted unfairly in failing to give the protestants advance notice that it considered their sampling techniques to be deficient. The court also criticized the Commission for failing "to meet the requisites of clarity" in that "principal findings of the Examiners * * * were neither adopted nor rejected * * *" (*id.* at 1310); for alleged internal inconsistencies (*id.* at 1316); and for alleged deficiencies in "discussion of the total services available at the time of the hearing and at the time of the decision"(*id.* at 1315).

The court refused to remand the proceeding to the Commission. It concluded that remand would serve "no useful purpose" in that the applications had "been pending since 1965, and the facts developed in this record have little bearing on a determination

at this time of 'the present or future public convenience and necessity' " (*id.* at 1319).

On September 17, 1973, the United States and the Interstate Commerce Commission filed a motion for amendment of judgment to provide for a remand of the proceedings to the Commission for further action consistent with the court's opinion. In an opinion filed October 4, 1973, (App., vol. I, 809) the court denied that motion. It declared that the applicants should file new applications and present the Commission with current facts reflecting the current situation in order that the Commission might make a legally valid appraisal of the public interest in the light of such facts (App., vol. I, 816).

SUMMARY OF ARGUMENT

Since the enactment of the Interstate Commerce Act, it has been recognized that the "Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted." *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. Its function "is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *Ibid.* The reviewing court's function is limited to determining whether the Commission's decision is free of legal error and supported by substantial evidence in the record as a whole. "The judicial function is exhausted when

there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-287.

By treating the test of 5 U.S.C. 706(2)(A) that the action of the agency not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as an additional item to be engrafted onto the "substantial evidence" test governing judicial review of agency findings made on the record after hearing, the district court misinterpreted its scope of review. If the agency's findings are supported by substantial evidence, and are within the agency's statutory powers, they are not "arbitrary or capricious" or "without a rational basis" as those terms are used in the Administrative Procedure Act. It is only when a finding is without substantial basis in the evidence that it lacks rational foundation. Cf. *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. In short, the standard of review applied by the district court is a contradiction in terms.

The district court, under the guise of the "arbitary or capricious" standard, erroneously undertook the Commission's function to weigh the evidence and fashion appropriate relief and to substitute its judgment for that of the Commission. In so doing, the court either ignored or misinterpreted the Commission's treatment of the evidence.

The Commission's findings are supported by abundant evidence. The Commission not only received voluminous evidence demonstrating a need for ad-

ditional motor carrier service between the southwest and the southeast, it also received substantial evidence with respect to the need for service with respect to each route which it authorized in this proceeding. In light of this evidence, and since there is no other reason for setting the Commission decision aside, the judgment of the district court should be reversed with directions to dismiss the complaint. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621.

However, further Commission proceedings should not have been precluded even if it was proper for the district court to set aside the Commission's decision. Reviewing courts are not authorized to make the ultimate determination that a certificate should or should not be granted. If a reviewing court finds that the Commission erred in making such a determination, the appropriate disposition is to remand to the Commission for further proceedings consistent with the court's opinion. The district court's refusal to remand in this case was improper.

The court's assertions that the record is too stale and too bulky to be useful are incorrect and do not justify its action. If the record required additional evidence to bring it up to date, the Commission should have been given an opportunity to reopen the existing proceeding for the receipt of additional evidence. Forcing the Commission to begin afresh with an entirely new proceeding is an unwarranted interference with the Commission's discretion in managing its own proceedings.

I. THE DECISION BELOW IS BASED ON AN IMPROPER STANDARD FOR JUDICIAL REVIEW OF AGENCY FACT-FINDING

This case does not involve any question with respect to the Commission's statutory authority to issue certificates of convenience and necessity to motor carriers, the legal criteria which govern the issuance of such certificates, or the propriety of the procedures which the Commission followed in reaching its decision. The appellees' challenge to the Commission's action was based solely on a claim that the Commission had erred in finding that shippers need the additional services which Red Ball, Bowman and Johnson have been authorized to provide. A determination that existing service is inadequate is essentially factual and judicial review of such a determination is governed by the applicable statutory standard for judicial review of agency findings of fact made in adjudicatory proceedings.

The fundamental error in the district court's decision lies in its misunderstanding and concomitant misapplication of the "arbitrary or capricious" standard of Section 706(2)(A) of the Administrative Procedure Act. It concluded that Section 706(2)(A) permits a reviewing court to set aside an agency decision if the court disagrees with the agency's evaluation of the weight of the evidence. It set aside the Commission decision because it believed the evidence presented by appellees was entitled to greater weight than the Commission accorded to it.

The decision below thus violates the long-established principle that a court's function in reviewing

fact-findings in an adjudicatory agency proceeding is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474. The reviewing court is not entitled to substitute its judgment with respect to the weight of the evidence in the absence of a provision permitting *de novo* review of a particular administrative action.

The meaning and purpose of the substantial evidence rule is explained in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, where this Court observed (*id.* at 619-620):

> We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. "[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.
>
> Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.

Although the court below referred to the limitations on judicial review described in *Consolo*, it substantially departed from them. It did not limit its analysis of the evidence to a determination of its sufficiency to support the Commission's findings. Indeed, it held that "a mere review of the sufficiency of the evidence will not suffice" where there is an "allegation" that agency action is arbitrary or capricious (App., vol. II, 1307). And it invalidated the Commission's order without finding that it was not supported by substantial evidence and without finding that the Commission had failed to make appropriate findings. On the contrary, the court acknowledged that the "[d]efendants' briefs contain extensive references to excerpts from the record cited to support the ultimate conclusions of the Division" (App., vol. II, 1309) and that the Commission's ultimate conclusions are supported by portions of the record (*ibid.*)

The district court's Conclusions 12-21 (*id.* at 1310-1316) reveal that the court invalidated the Commission order, notwithstanding the abundance of evidence supporting the Commission's findings, because the court disagreed with the Commission's evaluation of some of the contrary evidence. In particular, the court felt that certain transit time studies which appellees introduced to demonstrate the adequacy of existing service were entitled to considerable weight

while the Commission determined that shipper evidence of inadequate service was entitled to greater weight.

The district court attempted to justify its action by asserting that the substantial evidence rule is not the sole test of the validity of agency actions under Section 706. It noted that Section 706(2)(A) provides that a reviewing court shall "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *." Then the court labelled the Commission's determinations with respect to the probative value of the appellees' adequacy of service evidence as "arbitrary and capricious" and concluded that this rendered the Commission's adequacy of service finding invalid (App., vol. II, 1311).

The end result of the district court's interpretation of the "arbitrary or capricious" concept is to permit a reviewing court to engage in the type of "weight of the evidence" determination which is forbidden by the substantial evidence standard. Such an interpretation of Section 706(2)(A) would defeat the "very deliberate" purposes of Section 706(2)(E) which are described in this Court's *Consolo* opinion.

In enacting Section 706 of the Administrative Procedure Act, Congress obviously did not intend to require reviewing courts to reweigh the evidence in subsection 2(A) and prohibit them from doing so in subsection 2(E). Section 706 should be interpreted in a manner which harmonizes its parts. This

is readily accomplished by holding that any finding which is supported by substantial evidence in the record as a whole is not "arbitrary" or "capricious" within the meaning of Section 706(2)(A)—an interpretation entirely in accord with logic, precedent, and the legislative history of Section 706.

This Court's opinion in *Citizens to Preserve Overton Park* v. *Volpe, supra*, does not support the proposition that a finding which is supported by substantial evidence may be set aside as arbitrary or capricious. Although the Court noted that agency action may be set aside in all cases if arbitrary or capricious and may be set aside in some cases if it was not supported by substantial evidence (401 U.S. at 413-414), the Court did not examine the relationship between these two standards. The *Overton Park* case involved agency action which was "not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial-evidence review * * *" (*id.* at 415); thus the holding of *Overton Park* is simply not applicable to adjudicatory proceedings.

In any event, the description of the scope of review under an "arbitrary or capricious" standard contained in *Overton Park* is inconsistent with the district court's assumption in the present case that the "arbitrary or capricious" standard provides a more expansive scope of review. This Court said that although under the "arbitrary and capricious" standard, the "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow

one" and cautioned that a court "is not empowered to substitute its judgment for that of the agency" (*id.* at 416).

The federal courts have long recognized that an "arbitrary or capricious" action within the meaning of the Administrative Procedure Act is action taken without a rational basis. In *National Labor Relations Board* v. *James H. Matthews & Co.*, 342 F.2d 129, 131 (C.A. 3), certiorari denied, 382 U.S. 832, the court of appeals observed:

> Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. This court, and others, have heretofore held that "something more than error is necessary to spell out arbitrary or capricious action." *N.L.R.B.* v. *J.W. Rex Company, supra*, 243 F.2d 358, and the cases therein cited; *N.L.R.B.* v. *Parkhurst Manufacturing Company, supra*, 317 F.2d 518. The fact that on the same evidence a reviewing court could have reached a decision contrary to that reached by the agency will not support a determination that the administrative action was arbitrary and capricious.[4]

If a finding is supported by substantial evidence, then the agency necessarily had a rational basis for

[4] Accord: *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591, 594-595 (D. D.C.); *Dell Publishing Co.* v. *Summerfield*, 198 F. Supp. 843, 844 (D. D.C.), *affirmed*, 303 F.2d 766 (C.A.D.C.); *East Tex. Motor Freight Lines* v. *United States*, 96 F. Supp. 424, 427-428 (N.D. Tex.).

adopting that finding. Therefore, the "arbitrary or capricious" standard is not properly viewed as an "additional" test of the validity of agency findings in adjudicatory proceedings; rather, as applied to fact-finding, it is synonymous with the "substantial evidence" test.

The legislative history indicates that Congress viewed the "substantial evidence" test as the means of applying the "arbitrary or capricious" standard to agency findings of fact. The final "Report of the Committee on Administrative Procedure" [5] served as the focal point for the enactment of the Administrative Procedure Act. In reviewing existing law, that Report observed that "judicial review may be expected to check extremes of arbitrariness or incompetence in administrative adjudications. This the courts have generally done, as is discussed below, by requiring the adjudications to be supported by substantial evidence" (*id.* at 78-79). And, the Report continued, "* * * the question whether the administrative finding of facts rests on substantial evidence, it is said, is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unwarranted" (*id.* at 88).

Three members of the Committee urged Congress to adopt a uniform provision with respect to the

[5] Report of the Committee on Administrative Procedure, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

scope of review in adjudicatory proceedings. They proposed that reviewing courts consider and decide "all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious."[6] The use of the words "action otherwise arbitrary or capricious" indicates that they considered the adoption of unsupported findings to be one form of arbitrary or capricious action.

When the Administrative Procedure Act was enacted, Congress provided a similar enumeration of the subjects of review in Section 10(e), 60 Stat. 243.[7] Section 10(e) was not limited to review of adjudicatory proceedings. It purported to describe the scope of review with respect to all types of reviewable agency action. The Senate Judiciary Committee explained that it "is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review." Senate Judiciary Committee print of June 1945 on S. 7, p. 39, reproduced in "ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY," S. Doc. No. 248, 79th Cong., 2d Sess. 11 (1946).

[6] S. Doc. No. 8, 77th Cong., 1st Sess. 246.

[7] Section 10(e) was substantially identical to the present Section 706.

The structure of Section 10(e) (now Section 706) indicates that Congress intended the "substantial evidence" test to be specifically applicable to adjudicatory findings and the "arbitrary or capricious" standard to be generally applicable to other matters requiring review.[8] Each of the categories of review contained in the Administrative Procedure Act embodies a specific application of the generic standard contained in Section 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The "arbitrary or capricious" standard, therefore, is not an additional test—more stringent than the "substantial evidence" test—to be applied to adjudicatory findings. Since the decision below is based on the erroneous premise that this is the case, the district court's judgment should be reversed.

[8] This does not mean that the general "arbitrary or capricious" standard is not applicable to the non-fact finding aspects of adjudicative proceedings. For example, if the ultimate conclusion were totally unrelated to the findings, then the decision of the agency would be "arbitrary and capricious" even though each finding might be supported by substantial evidence. Agencies also make procedural decisions during the course of an adjudicative proceeding which might be challenged as an "abuse of discretion." It has long been recognized that the standard of review governing an agency's administration of its own procedural rules, *American Farm Lines* v. *Black Ball*, 397 U.S. 532, 538-539, or its decision to reopen a proceeding or grant a rehearing, *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-519, is whether the agency's action was arbitrary or capricious or otherwise an abuse of discretion, even though the decision was made within the context of an adjudicatory proceeding.

II. THE DISTRICT COURT SHOULD BE DIRECTED TO DISMISS THE COMPLAINT AND SUSTAIN THE COMMISSION'S DECISION

Although this Court frequently remands cases for reconsideration under proper standards if it finds that a lower court has applied an improper standard of review, this is not an inflexible rule. The Court has often determined that an agency decision should be sustained without further appellate proceedings. *E.g., Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621; see also *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 75. The latter procedure is appropriate in this case. The district court did not and could not conclude that the Commission's findings are not supported by substantial evidence and no other valid reason for setting aside the Commission's order has been presented.

A further delay in the resolution of this 9-year-old controversy would not only be unnecessary and wasteful, it would also have serious adverse consequences for the public interest. The Commission granted these certificates in order to satisfy the burgeoning transportation needs of the mutually dependent economies of the southeast and the southwest. These needs will remain unsatisfied until judicial review of this Commission decision is finally completed.

A. The Commission Findings Are Supported By Substantial Evidence

No court could reasonably conclude that the Commission findings in this case are not supported by substantial evidence. The Commission decision was

based on "what is perhaps the most extensive record ever developed in connection with a single group of motor carrier application[s]" (App., vol. I, 103). The Commission noted (App., vol. I, 126-127) that "[a]pproximately 650 shippers have complained about inconsistent and excessive transit times, and over 200 introduced transit time studies demonstrating the undependable service they currently receive," [9] and that "[a]bout 70 of the shippers located at points in a total of 16 States complain collective about certain carriers' service restrictions and embargoes as well as about the outright refusals of authorized carriers to handle traffic," while "[p]ickup and delivery complaints were voiced by about 150 shippers located throughout 18 States." [10] Furthermore, the Commission relied upon evidence presented by approximately 110 shippers who complained about interline difficulties and about 200 shippers who "collectively com-

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[9] For an extensive index to the record made before the Commission of the complaints concerning: (1) excessive and erratic transit times; (2) service restrictions, embargoes, and refusals to handle traffic; (3) pick-up and delivery; (4) interline difficulties and loss, damage and misrouting; and (5) adverse effect upon shippers, see Appendix IV to the Joint Brief of the United States and Interstate Commerce Commission filed in the district court.

[10] In particular, the Commission noted that a number of the protestants "refuse to interline, refuse shipments of less than a specified weight, refuse to serve directly authorized points beyond major gateways, refuse to maintain through routes, joint rates, or interchange arrangements for furniture and other specified commodities, and refuse to protect through routes or joint rates on interline movements of shipments involving more than two carriers" (App., vol. I, 127).

plain about loss, damage, tracing difficulties, and misrouting, much of which occurred in interchange service" (App., vol. I, 127). Finally, the Commission observed that "[t]he above-described difficulties have resulted in shippers losing customers, business, and short-term discounts" (App., vol. I, 128, n. 36). This evidence clearly supports the determination that existing service is inadequate to meet the needs of the shipping public.

The Commission not only found that the evidence as a whole demonstrates a need for additional service between these two important regions, it also performed a comprehensive evaluation of the evidence presented by Red Ball, Johnson and Bowman with respect to the need for the particular services each proposed to provide (App., vol. I, 132-158).

For example, in considering Bowman's application to serve ten specified points in Mississippi the Commission noted that more than 100 witnesses who ship commodities to or from those points had experienced difficulties with inadequate, inconsistent, and excessive transit times and that transit-time studies submitted showed "that between 3 and 4 day service is generally rendered on a substantial amount of their traffic moving between Atlanta and major Mississippi points" (App., vol. I, 151). The Commission also considered the complaints of 25 witnesses concerning "refusals by authorized carriers to handle their traffic, and of carrier embargoes or restrictions" (*ibid.*), including complaints directed against three of the appellees—Dixie, Campbell, and Roadway. Other shippers complained of "loss, damage, difficulties with interline service, lost business and accounts, and customer complaints" (*ibid.*). Finally, the Commission cited testimony that "witnesses located at such points in Mississippi as Jackson and Greenville have discontinued shipping from Atlanta because of the problems they have experienced" (*ibid.*).

The Commission also found that the carriers protesting the Mississippi portion of Bowman's application do not provide the service which Bowman proposes to provide. The Commission noted that "Dixie serves only 4 of the 10 Mississippi points here sought to be served by Bowman and maintains terminals at only 2 of these points" (*ibid.*), while Gordons (another appellee) does not actively solicit any traffic between Atlanta and Birmingham and seven of ten Mississippi points Bowman seeks to serve (*ibid.*). Other shippers complained of Ryder's failure to render "adequate service to Mississippi, and that it has refused to handle certain traffic to points in this State" (*ibid.*). The Commission further indicated (*ibid.*) that while Roadway, Braswell, and GFA had been authorized to serve points in Mississippi since the hearings in the instant proceedings, those carriers' services were still more limited than the proposed Bowman service."[11]

[11] For example, Roadway's "coverage of its operating rights in southern Alabama and Georgia is limited and it does not hold authority to render regular-route service at points in Florida" (App., vol. I, 152), while "Braswell's single-line operations to or from Vicksburg, Jackson and Meridian extend only as far east as Atlanta, and its authority in Alabama is

The Commission found comparable evidence with respect to each of the authorized routes. More than 60 witnesses who supported the Kansas-Missouri portion of the Bowman application complained about inconsistent and excessive transit times (App., vol. I, 152). The evidence demonstrated that two of the appellees (Roadway and Transcon) decline to handle some of the shippers' traffic (*ibid.*) while other carriers holding authority to serve a broad territory in the south "collectively serve only" a few major cities (*ibid.*).

Approximately 100 witnesses expressed a need for Bowman's proposed services between points in Arkansas and the southeastern and eastern seaboard territory presently served by Bowman (App., vol. I, 153). Similar testimony was presented concerning the inadequacies of service between New Orleans and specified points in Alabama and Tennessee, and between Dallas-Fort Worth, Texas, and the points Bowman currently serves (App., vol. I, 154).

In approving Johnson's "overhead" single-line service between a number of major points in Texas, Louisiana, and Mississippi and points it serves along the eastern seaboard and in the Gulf territory, the Commission observed that its application was supported by 236 witnesses whose "testimony establishes that the existing service on small shipments traffic between the involved territories is generally inade-

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limited to only the major points of Birmingham and Montgomery" (*ibid.*).

quate" (App., vol. I, 155).[12] The Commission also noted the existence of many complaints concerning lengthy and undependable transit times, poor pick up and delivery service, tracing problems and excessive loss and damage which the Commission recognized

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[12] The Commission has informed Congress:

> One of the most serious problems confronting the Commission is the maintaining of adequate service to shippers and receivers of small quantities of freight, particularly where such freight is not profitable to handle or moves to or from outlying locations. With most of the railroads not rendering any or very little less-than-carload service, the burden of supplying this service has fallen principally upon the motor common carriers, either alone or in conjunction with freight forwarders which are traditionally transporters of small shipments. A staff study by the Commission's Bureau of Economics, issued in 1967, shows that while a few motor carriers have responded to the small shipment challenge with new emphasis upon specialized equipment and service features, many carriers have reacted to this burden by instigating service curtailments or complete abandonment. Embargoes, rate increases, packaging and tariff restrictions, and other devices are employed by the motor carriers as an answer to their individual small shipment problems. However, the most serious threat to the maintenance of adequate small shipment service has been the increasing tendency of interline carriers to cancel their through route and joint rate agreements with other motor carriers and their refusal to participate in new agreements. The result has been that the number of informal shipper complaints concerning the deterioration of such service has been increasing sharply in the past year or two.
>
> Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, on Review of the Interstate Commerce Commission Policies and Practices, 91st Cong., 1st Sess., p. 290.

could "be attributed to the existing joint-line motor service" (*ibid.*).

In considering the applications of four southwestern carriers for authority to extend their routes to southeastern points, the Commission found (App., vol. I, 148) "that the evidence of record, including the traffic volumes shown to be moving and all other relevant factors enumerated in this report, justifies a grant of authority to only one of them."[13] The Commission then focused on the problem of which application should be granted. In concluding that Red Ball's proposal was the most feasible, it noted (*ibid.*) that "Red Ball operates over a much more extensive system of routes" than the competing applicants, and that because of its extensive terminals and equipment located at those terminals, Red Ball "is in a much better position to serve shippers and receivers located in the Southwest" than the others. The Commission also noted that Red Ball presented

[13]In considering Red Ball's application, the Commission specifically considered, as reflected by its discussion in Appendix D to its report (App., vol. I, 179), the grants of other authority and their effect as follows:

"* * * Since the close of the hearing, Braswell, Herrin, Mercury, and T.I.M.E. have been authorized to render single-line service between Atlanta and Dallas, Tex.; Braswell, Herrin, and Mercury have been authorized to serve between Atlanta and Houston, Tex.; Mercury, Braswell, Herrin, Campbell, and Roadway-West have been authorized to serve between Atlanta and Baton Rouge, La.; Braswell, Campbell, and Roadway-West have been authorized to serve between Atlanta and Jackson, Miss.; and Braswell, Campbell, Herrin, and Roadway-West have been authorized to serve between Atlanta and New Orleans, La."

130 supporting witnesses and that an additional 23 witnesses specifically supported its application. These factors, combined, qualified Red Ball "to receive the authority for which a public need has been found in this report" (App., vol. I, 149).

The district court did not question the quantity or quality of the voluminous evidence demonstrating that shippers do need the additional services which have been authorized by these certificates.[14] It focused almost entirely upon the appellees' evidence and asserted that the Commission's failure to give that evidence greater weight is "arbitrary." Such assertions do not imply that the evidence of need is not substantial.

Although the district court referred to the abundant evidence supporting the Commission's decision, it made no attempt to apply the substantial evidence test. Instead, by attributing significance to its finding that the Commission's decision was supported by "portions" but not the entire record, the court erected an impossible barrier to the sustaining of administrative findings. Every adversary proceeding involves contradictory evidence, and findings of fact always require rejection of some evidence. The fact that the court may have disagreed with the Commission's weighing of the evidence does not justify its refusal to sustain the Commission's order.

[14] It did suggest that the record evidence might not reflect the need for service at the time of the decision (App., vol. II, 1314-1316). That suggestion is unfounded. See pp. 34-35, *infra*.

B. The Commission's Decision Is Not Deficient In Any Other Respect

The district court emphasized several aspects of the Commission's decision which the court found to be "arbitrary". Analysis of these factors in light of the record in this case demonstrates that the court's conclusions represent nothing more than its own reweighing of the evidence and substitution of its judgment for that of the Commission. Moreover, in substituting its judgment for that of the Commission, the court overlooked or misinterpreted the relevant evidence.

1. *The Transit Time Studies*

The district court's conclusion that the Commission acted "arbitrarily" in its treatment of appellees' transit time studies is perhaps the clearest illustration of the court's erroneous approach to review. Contrary to the court's assertion (App., vol. II, 1310-1312), the Commission did not "reject" the studies or refuse to consider them. It merely determined that they should be accorded less weight than other evidence submitted by the shippers. That determination is reasonable and proper. The Commission explained (App., vol. I, 129):

> Generally, the [protestants'] exhibits cover periods subsequent to the notice of the commencement of the hearings in these proceedings. As a consequence, while they demonstrate that in certain instances during the study periods expeditious service was rendered by certain of the protestants, these studies must be considered in the light of the facts (1) that most either relate to short periods of time or cover traffic handled for specified shippers and (2) that they were made when protestants were confronted with the possibility of grants of authority to additional carriers. When viewed in this light, we believe that protestants' studies do not present as valid a picture as those introduced by those witnesses supporting the applications here under consideration.

The district court's statements (App., vol. II, 1312) that these "deficiencies" had not been suggested prior to the Commission's ruling, that protestants had not been given an opportunity to defend their evidence or correct such deficiencies, and that the Commission employed a new standard, are incorrect. In its earlier report in *Braswell Freight Lines, Inc., Extension—Atlanta*, 100 M.C.C. 482, 493-494—a proceeding which involved most of the protestants herein—the Commission announced that transit studies such as those submitted in the instant case were not persuasive in that they do not reflect a true picture of the overall pattern of transit-time service existing in the affected areas. Furthermore, protestants were given an opportunity in their petitions for further reconsideration to defend their evidence.

Similarly, the Commission did not apply a different standard in evaluating studies submitted on behalf of the applicants.[15] It recognized (App., vol. I, 126)

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[15] The court (App., vol. II, 1296-1297) erroneously asserts that the Commission overlooked Exhibits 1747-1763, presented

that these studies were also subject to deficiencies but concluded that "[t]hese infirmities, however, do not substantially affect the weight which should be accorded to the documentary evidence collectively presented by the supporting witnesses. Considered as a whole, the record demonstrates that many of the supporting witnesses are not receiving reasonably adequate service" (App., vol. I, 130).

In short, the Commission chose to accord greater weight to the testimony and documentary evidence submitted by the witnesses who supported the application than to appellees' transit time studies. The Commission's decision was not arbitrary; indeed, its evaluation of the relative probative value of the evidence was a proper exercise of its administrative function and, had the district court applied the correct standard of review, the Commission's action would have been sustained.

2. *The Adverse Impact of the Grants of Authority*

The balancing of adverse impact and the public need for additional service is precisely the kind of judgment which is entrusted to the Commission's expertise. The Commission has primary responsibility for implementation of the National Transportation Policy and, in discharging its responsibilities, the

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by one protestant covering periods prior to the notice of commencement of hearings. The Commission in fact considered such exhibits in stating (App., vol. I, 339) that the data reflecting operations during certain test periods submitted by Campbell reflected time performances ranging from 71.6 to 82.4 percent.

Commission must weigh the assertions of injury from new competition against the benefits from such competition.

Contrary to the district court's assertions (App., vol. I, 784-785), the determination that appellees will not be adversely affected by the grant of these certificates is not inconsistent with the facts found by the examiners and the Commission. Although the Commission did find that a loss of any of Roadway's eastbound traffic from Texas origins would result in a further imbalance in its operations (App., vol. I, 345) and that diversion of freight from Campbell's terminal points would result in deterioration of Campbell's service at smaller points in Mississippi (App., vol. I, 339), this does not detract from a determination that appellees did not make a sufficient showing of adverse effect to warrant rejection of all applications for authority. The Commission found that only one carrier, Holloway, had shown that its operations may be seriously affected and concluded that "• • • the gains to be derived by the shipping public in general far outweigh any adverse effect this carrier or any other protestant may experience" (*id.* at 157). The Commission was acting within its discretion in reaching that conclusion. *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409, 411-412; *United States* v. *Drum*, 368 U.S. 370, 374.

3. *Clarity of the Commission Decision*

The court's statement that the Commission decision lacks clarity because the principal findings of

the examiners were neither adopted nor rejected is unwarranted. The Commission did adopt "the examiners' summary of the evidence presented by the protestants as to their authorities, equipment and operations" (App., vol. I, 105). It did not, however, agree with the examiners' treatment of the evidence and regrouped the evidence to give a clearer picture of the needs of the relevant communities (App., vol. I, 121). The Commission decision represents a complete analysis of the evidence presented, and the rationale for its conclusions and the evidence relied upon are clearly set forth therein.

4. *Changes in Service During the Proceeding*

The district court also erroneously evaluated (App., vol. II, 1314-1316) the Commission's consideration of service instituted during the course of the proceeding in determining the competitive effect upon existing carriers. Focusing only on the "quantity of service available" (*id.* at 1314), the court ignored the Commission's repeated references to, and consideration of, changes in motor carrier operations in the area.[16] The Commission's treatment of these changes is manifested by its statement (App., vol. I, 106, footnote omitted):

> As indicated in appendix D, certain protestants request that official notice be taken of specified motor carrier changes, in the involved area, that have been approved and authorized by this

[16] See App., vol. I, 104, 105, 108, 115, 116, 130, 157, 173, 177, 181, 321, 324, 326, 333, 335, 339, 341, 344, 346, 354.

> Commission since the close of these hearings in August 1967. We may take official notice of our action in other proceedings which bear materially upon the issues under immediate consideration. *West Brothers, Inc., Extension—Baton Rouge, La.*, 108 M.C.C. 485, 489 (1969); and *Ayers Extension—Cheyenne, Wyo.*, 99 M.C.C. 795, 797 (1965). Accordingly, the actions affecting protestants have been noted in appendix G and those actions affecting carriers not parties to this proceeding, although not specified in detail in this report, have nevertheless been accorded full and careful consideration in our present determinations.

Thus, there is no substance to the suggestion that the Commission could not determine the need for service at the time of its decision.[17] The Commission did examine information which led to a change in circumstances and arrived at an informed assessment of the current need for service and the probable future needs of the affected areas.

Since the district court did not find the evidence supporting the Commission findings to be less than substantial and did not find any other significant error in the Commission proceedings, dismissal of the complaints should now be ordered.

[17] This erroneous assertion by the district court was a critical factor in its conclusion that the record was stale. See pp. 39-40, *infra*.

III. THE DISTRICT COURT ERRED IN PRECLUDING FURTHER COMMISSION CONSIDERATION OF THE SUBSTANTIVE MERITS OF THE PUBLIC CONVENIENCE AND NECESSITY ISSUES

Even if it is assumed *arguendo* that the district court could properly set aside the Commission's decision because it believed evidence presented by appellees was entitled to greater weight, the case should have been remanded for further Commission proceedings. It is well settled that "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145. The reviewing court's function "ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. See *National Labor Relations Board* v. *Food Store Employees Union, Local 347*, No. 73-370, decided May 20, 1974.

This precept is fitting here. Congress has delegated responsibility to the Commission to determine whether the "[p]ublic convenience and necessity" will be served by granting a certificate to a carrier. This delegation affords "administrative discretion to the Commission * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65. The reviewing court does

not have the power to make the ultimate determination that a certificate should or should not be granted. Its role is limited to determining whether the Commission has considered appropriate factors. Therefore, the district court's refusal to remand this case was improper.[18]

The cases cited by the district court do not support its refusal to remand. It relied on a statement in *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 17, that "under the particular circumstances of this case, we believe that it should be remanded to the Commission" in concluding that a remand is not always required. However, the court missed the thrust of this Court's reasoning in *American Trucking*. The Court there held that the Commission exceeded its statutory authority by granting contract carrier permits to a motor carrier subsidiary of a railroad without imposing "railhaul" restrictions or finding "special circumstances" justifying the waiver of such restrictions. The appellants claimed the Commission had already found that there "were no special circumstances aside from the alleged im-

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[18] Of course, if an agency exceeded its jurisdiction in initiating a proceeding or lacks continuing power to deal with the subject matter of the proceeding, then a remand would be inappropriate. *Williams* v. *Washington Metropolitan Area Transit Com'n.*, 415 F.2d 922 (C.A.D.C.), is an example of the latter situation. The court determined that a remand would be futile because the orders under review had been superseded by later fare orders and the Commission did not have authority to fix rates for the past. See, also, *Washington Gas Light Co.* v. *Baker*, 195 F.2d 29 (C.A.D.C.). Those decisions are not applicable, however, to a situation such as that here, in which the agency has the jurisdiction and the ability to correct the defect found by the reviewing court.

possibility of imposing the usual restrictions upon a contract carrier." *Id.* at 16. If this were the case a remand would serve no purpose because the Commission would be unable to grant the permits. This Court said that it was not certain the Commission had made such a finding and that it would be "warranted in precluding further proceedings only if, by an independent search of the record, we were able to conclude that, as a matter of law, there are no factors present which the Commission could have regarded as special circumstances." *Ibid.* The Court accordingly determined that the case "should be remanded to the Commission so that it can apply what we hold to be the applicable principles in such further proceedings as it may find to be consistent with this opinion." *Id.* at 17.

The district court here could not and did not find that as a matter of law there are no factors which could justify the grant of the certificates. The Commission's alleged "error" in evaluating the evidence can be cured by reweighing the evidence along with additional evidence received upon reopening. This Court's reasoning in *American Trucking* shows that this would be the proper procedure.[19]

[19] The district court's reliance on *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576, and *Zuber* v. *Allen*, 396 U.S. 168, is also misplaced. Neither *Atlantic Coast Line* nor *Zuber* involved review of agency findings in adjudicatory proceedings. Moreover, to the extent these decisions comment on the necessity of remand after review of agency action, they support our position. Thus, in *Atlantic Coast Line* this Court said: "When the primary jurisdiction doctrine requires initial decision by the Commission, it also precludes the court from redetermining the question itself should the Commission decision be defective. The proper course is to remand to the Commission * * *." 383 U.S. at 601. In *Zuber* this Court declined to remand a controversy concerning milk marketing orders to the Secretary of Agriculture because, among other reasons, the government did not request a remand; here, the Commission did request that the present case be remanded.

The district court attempted to justify its action by declaring in its opinion denying a motion to amend the judgment (App., vol. I, 809-823) that it was not precluding the Commission from granting certificates, but was only precluding the Commission from utilizing the present record because it is too bulky and too stale to be useful.

Recognizing that lapses of time between the conclusion of hearings and the issuance of a final agency order are inevitably involved in administrative proceedings, this Court has sustained agency determinations based on records no more current than the one involved in this case. See *Northern Lines Merger Cases*, 396 U.S. 491, 520-522; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515. As this Court observed in *Jersey City*, *supra*, 322 U.S. at 514:

> Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. * * *

Reopening of the record is within the discretion of the agency (see, *e.g.*, *Northern Lines Merger Cases*, *supra*, 396 U.S. at 520), and the Commission did not abuse its discretion in declining to reopen the proceedings in this case. As noted earlier, the Commission took notice of developments which occurred between the closing of the record and the issuance of its order. If, however, the district court's conclusion that new developments require further consideration is accepted, the course set forth in this Court's opinion in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 172, should have been followed. After noting several unquestioned recent events, including the amendment of a relevant statute between the date of the Commission's order and the court's opinion, this Court there stated:

> * * * These intervening facts so changed the complexion of the case that (even putting aside the consideration discussed above) the reviewing equity court, in the exercise of its sound discretion, should not have affirmed the order, as it did, but should have vacated it and remanded it to the Commission for further consideration in the light of the changed conditions. See *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 374; *Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U.S. 126, 130-131; *Gulf, C. & S.F.R. Co.* v. *Dennis*, 224 U.S. 503, 506-509.

The district court's prohibiting of the introduction of all or portions of the present record in a subsequent proceeding here was thus an unwarranted interference with the Commission's discretion in managing its own proceedings. Moreover, it reflects a misconception of the nature and significance of the evidence which casts further doubt upon the validity of the court's conclusions.

The court's statement that the record is too bulky indicates an assumption by the court that evidence introduced by other carrier applicants is irrelevant. That assumption is incorrect. Multiple application proceedings tend to overlap and to produce evidence establishing deficiencies in a broad area. All the evidence should be considered in such proceedings. The Commission's function is not to oversee a contest between competing motor carriers but to determine whether the "public needs the extra hauling capacity in the areas covered by the certificate." *Carolina Freight Carriers Corp.* v. *United States*, 297 F.Supp. 848, 852 (W.D.N.C.). In so doing, it must be free to review and rely upon all evidence of shipper dissatisfaction regardless of the carrier actually supported. To do otherwise would be to refuse to consider all relevant evidence of need. Although changes have undoubtedly occurred since this record was assembled, this does not make the voluminous evidence with respect to shipper needs and the capabilities of various carriers irrelevant. The Commission should be permitted to update the record in an appropriate manner (if necessary) and should not be required to conduct an entirely new proceeding.

Thus, even if it had been proper to set aside the Commission's decision, the case should have been remanded to the agency for a determination of the ap-

propriate course of action in light of the court's opinion. If additional evidence is required to bring the record up to date, the Commission should have the discretion to reopen the existing proceeding for the receipt of additional evidence. A "judgment which instructs the Commission to grant relief to the appellee and precludes the Commission from reopening the proceedings for the receipt of additional evidence * * * is an improper limitation on the Commission's duty to reconsider the entire case." *United States* v. *Saskatchewan Minerals*, 385 U.S. 94-95.

CONCLUSION

The judgment should be reversed, and the case remanded with directions to sustain the Commission's order under review.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

FRITZ R. KAHN,
General Counsel,

WILLIAM L. PATTON,
Assistant to the Solicitor General.

BETTY JO CHRISTIAN,
Associate General Counsel,

CARL D. LAWSON,
ROGER B. ANDEWELT,
Attorneys.

RICHARD H. STREETER,
Attorney,
Interstate Commerce Commission.

JULY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552958 9